

Zoning Board of Appeals

MINUTES

Wednesday, May 10, 2023 at 7:00 PM

To all persons interested in or affected by the actions of the Zoning Board of Appeals, you are hereby notified, pursuant to Section 11 of Chapter 40A of the General Laws of the Commonwealth of Massachusetts, and all amendments thereto, that a public hearing on the following appeals will be held on Wednesday, May 10, 2023, at the time indicated:

Call to Order

Chair Jake Dewey calls the meeting to order at 7:04 with an introduction of Board Members:

Member	Present	Absent
Dewey, Jacob	X	
Bodensiek, Herbert	X	
Pinard, Paul	X	
Hansen, Mark	X	
Johnson, Denise	X	
Webb, Aaron	X	

Also in attendance is Anna Brigham, Principal Planner; Jim Kupfer, Senior Planner; Brian Florence, Building Commissioner; and Genna Ziino, Administrative Assistant.

Notice of Recording

The Chairman reads: Please note that this meeting is recorded and broadcast on Channel 18 and in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

Minutes

April 12, 2023 and April 26, 2023 – Mark Hansen makes a motion to approve. Denise Johnson seconds. Herb Bodensiek notes that he is in favor but was not at the April 26 meeting.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Denise Johnson, Mark Hansen

Nay: None

Old Business

7:00 PM

Appeal No. 2023-006

Andersen

Denise M. Andersen, Trustee of the Andersen 77 Parker Road Nominee Trust, has petitioned for two Variances from Section 240-13 E. Residence C (RC) District, Bulk Regulations, and 240-36 Resource Protection Overlay District (RPOD). The Petitioner seeks two variances to unmerge Lot 1 (40,075 sq. ft.) from Lot 2, a developed lot containing 43,915 sq. ft., pursuant to the plan prepared by Sullivan Engineering and Consulting, Inc. The subject property is located at 77 Parker Rd, Osterville, MA as shown on Assessor's Map 117 as Parcel 135. It is located in the Residence C (RC) Zoning District. Continued from March 22, 2023, April 12, 2023 and April 26, 2023.

Attorney Schulz requested to continue this appeal to May 24, 2023. Herb Bodensiek notes that he cannot attend the May 24 meeting. Mark Hansen makes a motion to continue the appeal to May 24, 2023 at 7 PM. Paul Pinard seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Denise Johnson, Mark Hansen

Nay: None

Appeal No. 2023-006 Andersen is continued to May 24, 2023 at 7 PM.

Russell and Carol Wilkins, 1045 Shootflying Hill Road, have filed an appeal of an Administrative Official's Decision in accordance with M.G.L. Chapter 40A §7 and §15. The Petitioners seek to overturn the Denial of Request for Enforcement from the Building Division, dated March 3, 2023. In the Denial of Request for Enforcement Letter, the Local Inspector stated that under §240-128 and §240-8A(4) Agriculture – agricultural uses under five acres are permitted with some exceptions and after review and inspection found that no zoning violation exists. The subject property is located at 1055 Shootflying Hill Road, Centerville, MA as shown on Assessor's Map 191 as Parcel 027. It is located in the Residence D-1 (RD-1) and Residence C (RC) Zoning Districts.

Attorney George Asack is representing the applicants, who live at 1045 Shootflying Hill Road. He presents new documents to the Board in support of his application (entitled "Memorandum in Support of the Petitioner's Appeal from the Denial of Their Request for Enforcement"). He believes the use at 1055 Shootflying Hill Road is not exempt and is in violation of residential zoning requirements. Section 240-10A says, "Any use which is injurious, noxious, or offensive by reason of emission of odor, fumes, dust, smoke, vibration, noise, lighting, or other cause" are prohibited in every district. The resident at 1055 Shootflying Hill Road (Zachary Hallett) has 23 goats, a significant manure pile, and various outbuildings. He walks the Board through the photos submitted (entitled "2023-009 Photos") of his clients' yard before and after the goats. He says Mr. Hallett has not properly licensed the outbuildings erected and has not fenced the area at all. He describes the hardship the goats are creating for his clients: there is an overpowering odor, damage to his client's fence and vegetation, rats, and unsightly outbuildings and manure piles—all of which impact their ability to fully use their yard. He submits a letter for public comment from a neighbor in support of his clients.

Russell Wilkins, one of the applicants, addresses the Board. He further describes the hardship the goats are creating for him and his wife. He describes the timeline of visits from the Building Inspector and the Health Inspector, both of whom ultimately found that there was no violation. The Health Inspector has worked with Mr. Hallett to make improvements, but Mr. Wilkins does not have good faith. He presents a diagram of the property to the Board and invites them to visit the property.

Carol Wilkins, the other applicant, addresses the Board. She feels that if the town doesn't have regulations to protect property owners from nuisance impacts of agricultural uses, she recommends this Board institute or initiate better regulations for agriculture in proximity to residential property lines, such as requirements for fencing, setbacks for pasturing and structures, and number limits.

Chair Dewey brings it back to the Board for questions. Chair Dewey asks about the Board of Health's position. Mr. Wilkins explains that the Health Inspector said at her last visit that the odor did create a violation and she was working with Mr. Hallett to ameliorate that problem. Attorney Asack says there are licensing and zoning requirements for the structures, and none of them have met requirements. There is discussion of whether there are limits to the number of animals in agricultural situations. The Board discusses whether they find a violation. Attorney Asack believes that Section 240-10A is a coverall that applies to all zoning districts. There is discussion of whether Mr. Hallett is using the goats for business purposes or food purposes.

Building Commissioner Brian Florence addresses the Board. He reminds the Board that their role is to determine if the zoning officer executed his duties correctly—not to decide if the goats or anything associated with them is acceptable. The Building Department factored the entirety of the ordinance (including Section 240-10A, which was not included in the appellant's application or publically noticed), as well as its intent, into their decision. Section 240-8 (4) says "Agriculture, horticulture, viticulture, aquaculture and/or floriculture on a parcel of land five acres or less in size shall be permitted." Agricultural uses were specifically exempted from the ordinance, including Section 240-10. MGL Chapter 40 Section 3 states, "No zoning ordinance or by-law shall prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture..." So MA legislature says zoning cannot regulate agriculture, and the town ordinance uses exact language taken from that legislation in the ordinance to exempt those uses. In other words, the town's purpose was to say that zoning cannot regulate agriculture, even under 5 acres, with no dollar amount attached.

He also explains that there is a parallel track of enforcement being taken through the Board of Health, who has issued orders to Mr. Hallett to make corrections such as moving structures, properly storing feed, covering specific areas in sand, and doing a manure mitigation plan. The process is ongoing. Commissioner Florence believes the administrative official executed his duty properly in denying zoning enforcement. The other concerns are a civil matter and should be addressed through the court system—this is not a zoning issue. The group discusses whether Mr. Hallett is required to have a fence and if it would need to meet zoning requirements, and whether the structures need to meet setbacks. Commissioner Florence explains that landscape structures (fences) are exempted and the buildings here are subject to Board of Health requirements, which the Health Inspector is managing.

Chair Dewey opens for public comment. Zack Hallett, the owner of the goats addresses the Board. He explains the history of his property and the goats. He is not making money off the goats and has plans to rehome most of them. He is currently working with the Health Inspector to put their suggestions in place, and is and always has been in compliance.

Chair Dewey says a letter from Barbara White of 126 White Pine Lane was submitted in support of the Wilkinses, with concerns about the goats and their negative impacts.

Attorney Asack requests the Board suggest a review of this to Town Council. Chair Dewey makes a motion to close public comment. Aaron Webb seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Denise Johnson

Nay: None

The Board deliberates. They discuss whether this is a zoning issue or not. They consider whether Section 240-10 applies. They discuss that this may be something Town Council should consider changing in the future, but agree that currently there is no zoning violation. The group discusses continuing the item or escalating to Town Council.

Aaron Webb makes a motion to continue this in order to hear from the Board of Health and get clarification on the zoning ordinances. Chair Dewey says what they're voting on is very specific from the application: §240-128 and §240-8A(4). Aaron Webb agrees and his motion does not receive a second or a vote.

Paul Pinard makes a motion that the Board affirm the Building Commissioner's finding that the agricultural use at the property of 1155 Shootflying Hill Road, Centerville is not a violation of Section 240-128 and 240-8 A(4). Herb Bodensiek seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen, Denise Johnson

Nay: None

Appeal No. 2023-009 Wilkins is upheld.

7:02 PM

Appeal No. 2023-010

Arista Hyannis LLC

Arista Hyannis LLC has applied for a Special Permit in accordance with Section 240-25(B)(22) and 240-25(C)(10) Drive-Through for a proposed restaurant. The Applicant proposes to remodel the former bank building and change the use to a food service establishment with a drive-through. The subject property is located at 715 West Main Street, Hyannis, MA as shown on Assessor's Map 249 as Parcel 155. It is located in the Highway Business (HB) District.

Sitting on this is Chair Dewey, Paul Pinard, Mark Hansen, Aaron Webb, and Herb Bodensiek. Aaron Webb discloses that he owns a business at 644 West Main St., a full-service restaurant, and has submitted a disclosure form to the town.

Attorney Eliza Cox is representing the applicant and is joined by Greg and Harry Botsivales, principals of Arista Hyannis LLC and owners of the property; Usama El Sehrawey, Terry Smily, and Josh Levine of Fashion Food LLC, a local Wendy's franchise and proposed tenant for the site; Randy Hart, Traffic Engineer from VHB; and Todd MacDonald, Civil Engineer from BSC Group. She walks the Board through their application with details on the property. She explains the proposed project: they are seeking to remodel the existing building within the existing footprint by right. They are proposing to reconfigure the drive-thru stations that exist there now (2 existing, 1 proposed), for which they need a special permit. There is no other relief requested.

Attorney Cox walks through the VHB Transportation Analysis Highlights. The analysis considers the trip generation impact of a drive-thru window. The analysis found that in the morning peak hour there would be an increase of 4 trips. In the weekday peak hour it is mostly the same with or without a drive-thru. Overall, there is almost no additional impact in terms of trip generation. The analysis also considers onsite queue storage and circulation. They conducted queue observations at busier Wendy's locations and the average number of queued vehicles was 4 and the highest number observed was 8. The proposed onsite queue storage is 11 vehicles, so the proposed layout will accommodate the drive-thru queue during peak conditions.

Randy Hart, Principal of VHB who prepared the traffic impact assessment provides more information about the study. He explains that they observed 2 nearby Wendy's locations: Rte. 28 in Mashpee, which carries 26,500 people per day and Rte. 132, which carries 21,700 people per day. By comparison, West Main Street carries 14,400 people per day. He shows data to support the claim that the results from the traffic assessment are conservative. The interaction between Barnstable High School and Wendy's would be

primarily during the morning student arrival and the afternoon dismissal. During these two times, typical activity at Wendy's is low. During the peak summer season when Wendy's is busiest, the school is not open. He says Planning & Development staff have submitted that the queue capacity needs to be 13 cars, but he does not understand why and requests that data. Attorney Cox reviews site and project considerations with the Board. She shares her response to the Staff Report and contends that a drive-thru window would not substantially adversely affect the community.

Back to the Board for questions. They discuss the hours of operation (6:30 AM-11 PM) and the effect on the nearby properties. They discuss that the empirical data for the traffic study was collected the first week in October 2022, so the numbers would increase in the summer months. They discuss how many employees work a normal shift and how that will impact the limited parking spots. At peak times there are 8 employees. There will only be 6 seats in the building. They discuss the difference between this proposed business and the Rte. 132 Wendy's.

Greg Botsivales explains the impact drive-thrus have on businesses, from his experience. He says the proposed business will never do the amount of business the Mashpee or Hyannis Wendy's do. It doesn't make sense for them to open a business that doesn't operationally work—it is in their own interest to create a site that functions well. He explains the breakdown of a day in terms of when a Wendy's does the most business. They don't have a busy period that would create gridlock.

Jim Kupfer, Senior Planner doesn't believe the applicant responded adequately to the town's concern about the reduction of inside seating and the resulting queue capacity. Staff is concerned about the public health, safety, convenience, and welfare of the community. DPW did a thorough review of the traffic study and agreed that it was to the standard of ITE, but this location is not a standard location because of the proximity to the high school. The Board discusses their concerns with the project.

Chair Dewey opens for public comment. Councilor Nick Atsalis of Precinct 4 speaks in opposition, with concerns about the nearby residential area, the school, and the already dangerous intersection there (which DPW is planning mitigation for).

Chair Dewey reads into the record the letters received for public comment. Letters in opposition were received from Bailey Solgovic, Bramhall, Brooke, Caney, Carlisle, Casale, D. Brown, Dawes, Dr. Ahern Superintendent of Schools, Franz, Garrison, Granger, Kelly, L. Brown, Lindsay, Lynch, McCarty, Meins, Mitchell, Moseley, Nichols, O'Neil, Pare, Pollock, Schwaab, Shank, Silk, Smith, Stockdale, Strand, and Theoharidis. A letter in support was received from Skinner. Chair Dewey leaves public comment open.

Attorney Cox says she believes this proposal meets the criteria set out in the bylaw and they have submitted data to support that.

The Board expresses many concerns with the proposed project, including the high school's proximity, the already-dangerous intersection there, and the already-heavy traffic flow. They discuss whether a peer review would be helpful or not.

The Board takes a 5-minute recess and reconvenes at 10:02 PM.

Chair Dewey makes a motion: The Board has determined that an outside consultant is required to review the Traffic Study submitted by the Applicant. As provided by Chapter 44 Section 53G, the Board is authorized to impose on applicants reasonable fees for the employment of outside consultants for the purposes of reaching a final decision on the Special permit. The consultant shall be chosen by, and shall report to, the Zoning Board of Appeals. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

Chair Dewey makes a motion to continue Appeal No. 2023-010 to July 26, 2023 at 7 PM. Mark Hansen seconds.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Mark Hansen

Nay: None

Appeal No. 2023-010 Arista Hyannis, LLC is continued to July 26, 2023 at 7 PM.

Correspondence

Hearing Notice – Cape Cod Commission for New England Wind Connector 1 on May 11, 2023 at 3:00 pm

Continued Hearing Notice – Cape Cod Commission for Martha’s Vineyard Reliability on May 11, 2023 at 3:00 pm

Matters Not Reasonably Anticipated by the Chair

Discussion

The Board continues their discussion of requests for withdrawals and continuances to the next in-person meeting.

Upcoming Hearings

May 24, 2023, June 14, 2023, June 28, 2023. Mark Hansen and Herb Bodensiek cannot attend the May 24 meeting.

Adjournment

Chair Dewey makes a motion to adjourn.

Vote:

Aye: Jake Dewey, Herb Bodensiek, Paul Pinard, Aaron Webb, Denise Johnson, Mark Hansen

Nay: None

Documents Used at This Meeting

- 2023-009 Wilkins application packet
- Memorandum in Support of the Petitioner's Appeal from the Denial of Their Request for Enforcement
- 2023-009 Photos
- Public comment from Barbara White
- Diagram of the properties at 1045 and 1055 Shootflying Hill Road
- 2023-010 Arista Hyannis application packet
- Attorney Liza Cox’s PowerPoint Presentation
- VHB Transportation Analysis
- Staff Report for Arista Hyannis dated May 2, 2023
- Public comment from Bailey Solgovic, Bramhall, Brooke, Caney, Carlisle, Casale, D. Brown, Dawes, Dr. Ahern Superintendent of Schools, Franz, Garrison, Granger, Kelly, L. Brown, Lindsay, Lynch, McCarty, Meins, Mitchell, Moseley, Nichols, O’Neil, Pare, Pollock, Schwaab, Shank, Silk, Smith, Stockdale, Strand, Theoharidis, and Skinner.

Respectfully submitted,
Genna Ziino, Administrative Assistant

Further detail may be obtained by viewing the video via Channel 18 on demand at <http://www.town.barnstable.ma.us>